IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

F. H. DUEHAY, Superintendent of Prisons of the Department of Justice, O. P. HALLIGAN, Warden of the United States Penitentiary, McNeil Island, Washington, and J. J. LEISER, Physician, United States Penitentiary, McNeil Island, Washington,

Plaintiffs in Error,

vs.

FRED H. THOMPSON,

Defendant in Error.

No. 2533.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

Brief of Plaintiffs in Error

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STATEMENT OF FACTS.

This matter was before the lower court, after evidence taken, upon petitioner's complaint and

respondents' answer to the petition of relator for a writ of mandamus directing respondents, as the Board of Parole of McNeil Island Penitentiary, to receive the application of petitioner for parole and to give him a hearing thereon.

Petitioner was convicted upon an indictment in two counts and sentenced to four years imprisonment on each count—the sentences to run consecutively, not concurrently. That is, the second sentence to commence at the expiration of the first.

The President of the United States has commuted these sentences "to run concurrently". The parole act as amended provides:

"That every prisoner who has been or may hereafter be convicted of any offense against the United States and is confined in execution of the judgment of such conviction in any United States penitentiary or prison, for a definite term or terms of over one year, or for the term of his natural life, whose record of conduct shows that he has observed the rules of such institution, and who, if sentenced for a definite term, has served one-third of the total of such term or terms for which he was sentenced, or, if sentenced for the term of his natural life, has served not less than fifteen years, may be released on parole as hereinafter provided."

1914 *Supp. Fed. St. Annot.* p. 326.

"That nothing herein contained shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case, or in any way impair or revoke such good time allowance as is or may hereafter be provided by Act of Congress." Sec. 10, 36 Stat. L., p. 821; Fed. Stat. Annot., Supp. 1912, Vol. 1, p. 306.

Petitioner sought to file with the Board of Parole and have considered, his petition for parole, offered under the rules adopted regulating hearings by the Board. Petitioner sought parole at the expiration of one-third of the four-year period covered by these concurrent sentences; but was denied the right to file such application and denied a hearing thereon, the Attorney General for the Board, advising him:

"Please inform the prisoner that the Department does not agree with his conclusion that he is eligible to parole when he has served one-third of the commuted sentence. It is the view of the Department that he must serve one-third of his original sentence of eight years."

The respondent and appellant claims that petitioner is not entitled to parole and further that if he were at all entitled to parole the application therefor is premature.

See Transcript of Record, pages 15-19.

ASSIGNMENTS OF ERROR.

The assignments of error are as follows, to-wit:

I.

That the court erred in making Conclusion of Law II.

II.

That the court erred in making Conclusion of Law III.

III.

That the court erred in rendering its decision filed on October 31, 1914.

IV.

That the court erred in making the order dated and filed November 16, 1914.

V.

That the court erred in not holding that the petitioner could not be eligible to parole until he had served one-third of the term as originally imposed, to-wit: Eight years.

VI.

That the court erred in holding that one-third

of the total of the "term or terms for which he was sentenced" meant one-third of the term of the petitioner as commuted by the President, and in not holding that the words "term or terms" used in the statute referred to the original sentence imposed by the court, to-wit: Eight years.

VII.

That the court erred in not dismissing the complaint of the petitioner herein.

CONFINED IN EXECUTION OF JUDGMENT OF CONVICTION.

As a condition precedent to eligibility to parole the prisoner must be confined in execution of a judgment of conviction. The judgment of conviction is the sentence imposed by the court. The Executive, the President, has nothing to do with it. The commuted sentence of the President is not the sentence imposed by the court. The nature and definition of commutation show this. Thus in 29 *Cyc,* 1561, the definition is as follows:

"Commutation of sentence or punishment is the change of a punishment to which a person has been condemned to a less severe one."

Another good definition will be found in *Rapalje & L. Dict.* which is quoted with approval in *State vs. State Bd. of Corrections,* 16 Utah 478, 482, 52 Pac. 1090, and is as follows:

"Substitution of a lesser grade of punishment for that inflicted by the sentence pronounced upon conviction."

And again it is well defined in the case of *Ogletree vs. Dozier,* 59 Ga. 800, 802, as follows:

"Change from a higher to a lower punishment."

To illustrate further their marked difference a life sentence is an indeterminate sentence and may be commuted to a term of years, or again a death sentence may be commuted to a life sentence. This change cannot be said to have entered the mind of any one but the Executive, and when the prisoner is serving the sentence as commuted, he is serving something of which the Executive alone is the author and creator. Moreover, by commutation the Executive can impose a penalty for a crime which the courts had not the right or the power to inflict in the first instance.

Thus in *Ex Parte Harlan,* 180 Fed. 119, at page 127, it is said:

"Here, the punishment fixed was imprisonment in the penitentiary for a certain time, and it is changed to imprisonment there for a less time. The original sentence to the penitentiary being lawful, and the President having the power to shorten the length of imprisonment without otherwise interfering with it, the execution of the commuted sentence in the penitentiary cannot be unlawful merely because the statutes do not authorize the courts, in fixing the punishment in the first instance, to inflict imprisonment in the penitentiary for so short a time."

MEANING OF "SENTENCE".

The statute further provides "That every prisoner who * * * is confined in execution * * * in any United States penitentiary or prison, for a definite term or terms of over one year, or for the term of his natural life * * * and who if sentenced for a definite term, has served one-third of the total of such term or terms for which he was sentenced * * * ." The word "sentence" as above used clearly refers to that fixed by the court, to-wit: "the judgment of conviction", and the words "a term or terms" clearly mean those fixed by the court. This is conceded to be true and is acted on as true, but the defendant endeavors to stretch the meaning of the above quoted words to embrace also the President's commutation. For the statute to mean

this, after the words "one-third of the total of such term or terms for which he was sentenced" we must insert the words "or to which his sentence has been commuted" and after the words "if sentenced for the term of his natural life" we must insert the words "or if a death sentence be commuted to a life sentence". It could hardly be seriously contended that "sentence" in the sense used in the statute would be applicable to a commutation by the President from a death sentence to a sentence for life. In many cases where the sentence is the death penalty, the President reduces the sentence to life, but it never occurs to him that by so doing he is conditionally pardoning the man after fifteen years of imprisonment. Many sentenced to death are desperate characters, dangerous to be at large and the Executive naturally thinks that he is extending enough clemency when he gives them their lives.

PAROLE LAW NOT APPLICABLE TO COMMUTED SENTENCE.

The law itself segregates the court sentence from the Executive commutation and shows that it views them differently. Thus Section 10 of the Parole Act provides:

"That nothing herein contained shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case."

One might infer because a man had a right to be out on parole after serving one-third of his sentence that therefor, the right to pardon or reduce the sentence by the President was dispensed with. That if the Legislature said a man could be released by parole after serving one-third of his sentence it also meant to say that the President could not reduce the sentence so that he could be released absolutely after serving one-third of his term. Section 10 shows that the Parole Act and the pardoning power co-exist, that is, the court sentence is made a conditional pardon upon the President's conforming with certain conditions and at the same time the Executive pardoning power, whether by absolute pardon or by reducing the length of time of service, is left intact. But by co-existing it does not mean that the Act allowing sentences of courts to become conditional meant also to make the time substituted by the Executive for the court time, conditional. The Act did not mean to add to an act of grace, the reduction and commutation of time by the Executive, another act of grace, namely the reduction by parole

of such reduction or commutation. The Legislature did not intend to do so because the necessity does not exist. The same thing as parole may be accomplished by the conditional pardon. Thus it is said in *Ex Parte Wells*, 59 U. S. 313; 15 L. Ed. 421:

"A pardon, therefore, being an act of such a nature as that by the common law it may be upon any condition, it has the same nature and operation in Pennsylvania, and it follows that the Governor may annex to a pardon any condition, whether subsequent or precedent, not forbidden by law. And it lies upon the grantee to perform the condition; or if the condition is not performed, the original sentence remains in full vigor and may be carried into effect."

MEANING OF "SENTENCE ORIGINALLY IMPOSED".

It is preferable to have a pardon of such a sort that its violation will result in the service of the sentence originally imposed and it is probable that this old rule suggested the language of Section 6 of the Parole Act, as follows:

"If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced."

This court held in *Halligan vs. Marcil,* 208 Fed.

403, that a prisoner breaking his parole, who had prior to his release on parole, earned good time, upon his being remanded into custody was compelled to serve the sentence originally imposed by the court and not the sentence as reduced by his good time. And in a later decision, *Ex Parte Marcil*, 213 Fed. 990, the court, following the logic of the above decision holds that a prisoner can earn no good time after his return to prison for the breaking of his parole. If a man being out on parole after his sentence had been commuted, violated his parole, would not the logic of this decision compel the Warden to remand the prisoner for the period of the original sentence imposed by the court instead of that substituted by the President? Why should a man whose sentence was reduced by good time be controlled by any different rule than a man whose sentence had been shortened by the Executive? This clause more conclusively shows that the statute is directed at court sentences alone.

PARDONING POWER NOT TO BE IMPAIRED.

This statute says that the power to grant a pardon or commutation shall not be impaired. The

President, before the Act, had the power to reduce a sentence, say from eight years to four years. If you say that the Act is applicable to the reduced sentence, you are impairing his power. He says "I reduce a sentence from eight years to four years as I have a right to do. The man can serve four years and then be free". The court says to him, "You cannot do this. If you give him grace by lopping off four years this really means that he is entitled to parole grace at the end of one-third of four years. You have not the power to commute unless two-thirds of the reduced time is a conditional pardon". The President might well reply, "The prisoner had his choice, he could either take his eight years court sentence, which by law carried with it the right of parole after serving one-third of the time, or he could take the Executive pardon, which, though it carried with it no conditional right to be free at the end of one-third of his time, gives him the absolute right of freedom at the end of one-half of his time. The law allows me to grant a conditional pardon when I desire to do so, but does not compel me to do so when I am merely commuting a sentence".

The laws are to be construed liberally in favor of prisoners, but it is stretching far such liberality

to say that a law passed for the purpose of making court sentences less rigorous meant to do the same as to the pardoning power. The law was meant to temper justice, the sentence of the court, with mercy —not to temper mercy, Executive clemency, with additional mercy. But it may be said that this is not giving the Act a liberal construction to say that Congress meant to deprive a man altogether of his right of parole as soon as the President reduced his sentence—that it would be a hardship for a man sentenced to prison for say nine years and entitled to parole at the end of three years, to be deprived altogether of his parole because the President reduced his sentence to six years. We obviate the rigor of this construction by giving the language its literal meaning and say that when the prisoner has served one-third of the term for which he was originally sentenced, he should be entitled to parole even though he has already had one act of clemency extended to him. The logic of the law sustains the proposition that when the sentence is commuted by the President, the prisoner should serve the full time of the reduced sentence, but as a concession to the rule that a liberal construction should be given laws in favor of prisoners, we hold that the President did

not probably intend to deprive the prisoner of the right to parole which he already possessed because in such event we would be construing the President's act of leniency as depriving him of a clemency already granted to him. The difference is marked. We are construing the Executive intention so that the prisoner shall not be deprived of a right he already possessed on account of the exercise of such clemency, whereas the learned attorney for the defense is endeavoring to engraft on Executive clemency additional clemency meant to be applicable to judicial sentences alone. Our construction is more flexible, more reasonable on a further ground, to-wit: that it establishes a precedent less iron bound, less procrustean in nature. If the President desires, as in this case, to reduce the prisoner's sentence with no conditional right to be free at the end of one-third of the time, he can do so. If, on the other hand, he desires to reduce a man's sentence and pardon him conditionally after the service of one-third of the time, the law gives him this right. If the Executive so expresses his will, the courts must carry it out, but if the Executive does not do so, the courts have no right to read into his pardon words that were never there.

Then is it equitable that prisoners who are unable to secure commutation should have to serve a longer time to be entitled to parole than those who have secured it. The law should be just before it becomes generous.

THE GOOD TIME LAW.

The good time law provides:

"That each prisoner who has been or shall hereafter be convicted of any offense against the laws of the United States, and is confined, in execution of the judgment or sentence upon any such conviction, in any United States penitentiary or jail, or in any penitentiary, prison, or jail of any State or Territory, for a definite term, other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence to be estimated as follows, commencing on the first day of his arrival at the penitentiary, prison, or jail:

"Upon a sentence of not less than Six Months nor more than One Year, five days for each month.

"Upon a sentence of more than One Year and less than Three Years, six days for each month.

"Upon a sentence of not less than Three Years and less than Five Years, seven days for each month.

"Upon a sentence of not less than Five Years and less than Ten Years, eight days for each month.

"Upon a sentence of Ten Years or more, ten days for each month.

"When a prisoner has two or more sentences the aggregate of his several sentences shall be the basis upon which his deduction shall be estimated."

The lower court after quoting this clause says:

"Upon the argument it was stated without question that, in applying the good time law, upon commutation of a sentence, the good time is calculated as from the beginning on the length of term of the sentence as commuted and not upon the sentence as originally imposed. This practice would, certainly, be more consonant with reason than that now contended for under the parole law."

We grant that the practice is as stated by the court, but because the practice is a certain way does not make it right. Many banks and commercial houses follow practices for a number of years which they think are right until they are rudely awakened by the courts and informed that they are wrong. Officials and business men are often obsessed with the idea that a certain practice makes a thing legally right, a modification of the doctrine of "whatever is, is right". There is no precedent to show that this practice is right and we do not believe that the good time law should be applied to a commuted sentence any more than the parole law unless the President says so. The same reason controls in both cases,

that the law did not intend to pile a Pelion on an Ossa of mercy.

But, if for the sake of argument, we assume that the good time law is applicable to commuted sentences there are good reasons for the practice followed.

In the first place the good time law says, "in execution of the judgment or sentence" not "in execution of the judgment of such conviction". It may be in execution of the judgment imposed by the court or a sentence fixed in some other way, as for example, by the Executive.

In the second place, if you allowed a man whose sentence had been reduced, good time computed on his original sentence, you would have his sentence cut down beyond all reason. A person sentenced for ten years whose time was reduced to one year would get out in eight months. According to the law of compensation a man sentenced for a long time should be given more good time than one whose time is shorter. The statute has fixed it so the good time is in proportion to the length of the sentence and if you compute the good time on the reduced sentence

according to computation on the original long sentence, you destroy this proportion.

So even if we concede the good time law to be applicable to commuted sentences (which we do not) the reason for the practice in this instance is the same as the reason governing our construction of the parole law, namely to prevent a pardon from granting a greater reduction of the penalty than was intended by the Executive.

Respectfully submitted.

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